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No. 92-1747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STEPHEN APPELL,

Petitioner,

v.

WILLIAM P. BARR,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 3, 1993

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court had jurisdiction and plaintiff had standing.

2. Whether there exists a cause of action under Sections 501 and 504 for non–handicapped persons discriminated against on the basis of handicap.

3. Whether the Department acted *ultra vires* in quota–hiring handicapped persons.

4. Whether discrimination on the basis of handicap violates the Constitution.

5. Whether the trial court improperly dismissed the Civil Service Reform Act claim.

PETITIONER'S CERTIFICATE AS TO PARTIES

Your Petitioner is Stephen Appell, who was plaintiff below. Respondent is the Attorney General of the United States, currently named as William P. Barr, though the Government is entitled to automatic substitution of the Honorable Janet Reno. The Honorable Richard L. Thornburgh, Attorney General of the United States, was defendant below. There were no intervenors or *amici* below.

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In the United States District Court for the District of Columbia, MEMORANDUM & ORDER, Appell v. Thornburgh, Civil Action No. 90–2112 LFO (*filed*, May 10, 1991), *see* Appendix, at 5.

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN APPELL,

Petitioner

v.

WILLIAM P. BARR,
Attorney General
of the United States

Respondent

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review of a Judgment entered by the United States Court of Appeals for the District of Columbia Circuit on February 1, 1993, and this Petition is filed within ninety (90) days thereof pursuant to Rule 13.1. A Suggestion for Rehearing *en banc* was filed on February 25, 1993, and that suggestion, as well as a petition for rehearing before the panel, were denied on March 17, 1993. *See* Appendix, at 11-12. *Cf.* Rule 13.4.

This Honorable Court has jurisdiction for a writ of *certiorari* over this Judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV

> **Section 1. Citizens of the United States.**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1292(b)

> **Interlocutory decisions.** When a district judge, in making in a civil Action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an

appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall order.

28 U.S.C. § 1331

Federal question. The district courts shall have original jurisdiction of all civil actions under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 — **Civil rights and elective franchise.**

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [U.S.C.S. § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any

Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

29 U.S.C. § 791 — **Employment of individuals with handicaps.**

(a) **Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other committee resources; purposes and functions.** There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV [5 U.S.C.S. § 5315] or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Administrator of Veterans' Affairs, and the Secretary of Labor, the Secretary of Education and the Secretary of Health and Human Services. The Secretary of

Education and the Chairman of the Commission shall serve as co-chairpersons of the Committee. The resources of the President's Committees on Employment of People with Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with handicaps, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with handicaps, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act [enacted Sept. 26, 1973], submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in

such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement and advancement opportunities for individuals with handicaps.

(c) State agencies; rehabilitated individuals, employment. The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with handicaps, including the promotion of job opportunities for such individuals. The Secretary shall encourage such state agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees. The Commission after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with handicaps by each department, agency, and instrumentality and the effectiveness of the

affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Office of Personnel Management under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status. An individual who, as a part of an individualized written rehabilitation program under a State plan approved under this Act [29 U.S.C.S. §§ 701 et seq.], participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities. (1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions. (2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified handicapped individuals.

29 U.S.C. § 794(a)

Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 U.S.C.S. § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794a(a)(1)

Remedies and attorneys' fees. The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . shall be available to any employee or applicant for employment aggrieved by the final disposition of such complaint. . . .

42 U.S.C. § 1981 note

> . . . nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983

42 U.S.C. § 1981a(a)(2)

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in . . . section 505(a)(1) of the Rehabilitation Act of 1973 [29 U.S.C. 794a(a)(1)] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) . . . against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1983

> **Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d-1

Federal authority and financial assistance to programs or activities by way of grant, loan or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 [42 U.S.C.S. § 2000d] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or

other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000e–16 — **Nondiscrimination in Federal Government employment**

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 U.S.C.S. § 102], in executive agencies as defined in section 105 of title 5, [5 U.S.C.S. § 105] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the

Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of civil service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relation to equal employment opportunity.

The head of each such department agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit

referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 U.S.C.S. § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 U.S.C.S. §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its employment opportunity in the Federal Government.

45 C.F.R. § 84.4(b)(2)

> For the purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non–handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . .

STATEMENT OF THE CASE & JURISDICTION

Statement of the Case

The relevant facts in this matter are not in dispute. The facts appeared below, unchallenged, as follows:

> "Plaintiff is a non–handicapped, white male. For an extended period of time, he acted in the position of Supervisory Program Analyst in the Coordination and Review Section of the Department of Justice's Civil Rights Division. During his tenure, he received a performance rating of 'Excellent.'[1] Plaintiff was highly, and perhaps the best, qualified person for the position.
>
> "When it came time to announce the position, the Department chose to 'wire' the job to James Bennett, an Equal Opportunity Specialist from another agency with whom one of the deputy section chiefs had worked previously and been friendly. Mr. Bennett is orthopedically impaired. He was chosen under Schedule A, putatively pursuant to Section 501 of the Rehabilitation Act of 1973, as amended.[2] The selection was non–competitive. The selectee was given an absolute preference in selection for a job

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1 Plaintiff had previously received ratings of "Excellent," "Outstanding," and "Outstanding" in his prior three performance ratings as a Civil Rights Program Specialist.

2 Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 [hereinafter referred to as Section 501].

thereby designated as 'handicapped,' and plaintiff was not permitted to compete for the position.

"The Department of Justice had no affirmative action plan pursuant to Section 501 of the Rehabilitation Act of 1973, as amended, in force at the time of the selection of Mr. Bennett. The selection was not part of any plan, other than an *ad hoc* attempt to increase handicap representation in one agency, while decreasing such representation in another government civil rights office, through non–competitive selection of a marginally handicapped person who requires no reasonable accommodations other than a ramp at the door and a usable wash room.

"Plaintiff duly complained through the Department and the Equal Employment Opportunity Commission (EEOC)."

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS, AND CROSS-MOTION FOR PARTIAL JUDGMENT, at 2–3.

Statement of Jurisdiction

Jurisdiction is based on the following statutory provisions: 29 U.S.C. § 794a(a)(1) [discrimination on the basis of handicap in federal employment]; 28 U.S.C. § 1343 [general civil rights]; 42 U.S.C. § 1983 [remedial provision for civil rights]; 28 U.S.C. § 1331 [federal question]. All else failing, jurisdiction is based on the

Constitution through Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).[3]

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[3] The existence of subject matter jurisdiction is the central issue of this case and was the basis for the actions of the courts below. Argument in support of granting *certiorari* based on the lower court's holding on jurisdiction is found at 10, *infra*.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Supreme Court should grant the writ for three reasons: 1) because the appellate court held that handicap is not a protected class under the Constitution, which is inconsistent with prior rulings of other Circuits and of this Court; 2) because the decision of this Court in two other cases in which *certiorari* has been granted could have a significant effect on the correct result in this case; and 3) because the appeals court's error on the issue of jurisdiction is egregious and at variance with the precedents of this Court and of the other Circuits, and, if allowed to stand, will result in a cramped and incoherent view of jurisdiction in discrimination cases.

The proceeding is of exceptional importance because the Court of Appeals decided that handicap is not a protected class under the Constitution of the United States. The decision putatively follows a recent ruling by the Tenth Circuit, DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714 (10th Cir. 1988),[4] but overrules, without citation, the rationale behind a long–standing precedent which has been cited by the Supreme Court and most of the Circuits, Mills v. Board of Education of

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[4] The DeVargas case, which neither party urged upon the Circuit as relevant, is easily distinguished from the present case. In DeVargas, the defendant was not a Government bound by the Fifth or Fourteenth Amendments or 42 U.S.C. § 1983. The defendant was not even a federal funds recipient, and there was no question that Sections 501 and 504(a), 29 U.S.C. §§ 791, 794(a), did not apply. DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714, n. 16, at 724 (10th Cir. 1988). Unless the Circuit would hold the Attorney General of the United States to the same standards as a private citizen, unrestrained by affirmative Constitutional obligations, the case was properly signaled with a "*cf*" because it is not pertinent. Indeed, in the only case cited in DeVargas for the proposition that handicapped status is not a suspect class, the Fifth Circuit acknowledged that Constitutional rights would be invoked where a fundamental right was impaired, Brown v. Sibley, 658 F.2d 760, 766 (5th Cir. 1981), and, most particularly, held that Section 504 defined and absorbed the equal protection standards from Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1964) [race discrimination], and Title IX of the Education Amendments of 1976, 20 U.S.C. § 1681 (1976) [gender discrimination]. Brown v. Sibley, 658 F.2d at 768 (5th Cir. 1981),. Under the Brown standards, cited *sub silento* by the Circuit Court through DeVargas, Mr. Appell's argument under Section 501 of the Rehabilitation Act of 1973, as amended, prevails as a statutory argument, and he has no need of looking to the Constitution for his remedy.

the District of Columbia,[5] 348 F.Supp. 866 (D.D.C. 1972). *See* Rule 10.1(a, b). No law concurring with the appeals court's view has been identified by the parties or by the court *sua sponte*, but other court decisions, both old, *see, e.g.*, Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (1971), 343 F.Supp. 279 E.D. Pa. 1972), and newer, Society for Good Will to Retarded Children v. Cuomo, 572 F.Supp. 1300, 1341–49 (E.D.N.Y. 1983), have implied or necessarily found such a Constitutional right to protection from handicap discrimination.

The appellate conclusion is wholly inconsistent with the legislative history of the Rehabilitation Act of 1973, as amended. 29 U.S.C. § 791, *et seq.*[6] Congress has

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5 In Mills, the District Court decided that it had jurisdiction to ensure proper placement of handicapped students. The court addressed the issue prior to the enactment of Section 504, 29 U.S.C. § 794(a), or the Education of the Handicapped Act, 20 U.S.C. § 1401, and alluded to its Constitutional duties. Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972). The case was cited in the legislative history and by this Court many times as a motivating force behind the passage of Section 504.

6 The Act was "to provide equal treatment" 117 CONG. REC. 45974-75 (1971); *see also*, 118 CONG REC. 525-26 (1972), and to ensure the "rights . . . to equal protection under the laws" 118 CONG REC. 9495 (1972) [Humphrey]. The bill was significantly affected by the then–recent court decisions of Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (1971), 343 F.Supp. 279

evidenced an interpretation that equal protection includes protection from discrimination on the basis of handicap.[7]

E.D. Pa. 1972), and Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), in which the courts had found an equal protection basis under the Fourteenth Amendment for handicap discrimination protection. 117 CONG. REC. 45974-75 (1971) [Representative Vanik].

[7] "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964. 42 U.S.C. [§] 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. [§] 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination *on the basis of handicap*." House Rept. No. 93-1457, 93rd Cong., 2d Sess. (October 9, 1974); Senate Rept. No. 93-1139, 93rd Cong., 2d Sess. (September 6, 1974) [same language in both reports; emphasis supplied]. The Congress reiterated the position during the 1978 amendments to the Act: "The committee believes now as it did in 1973 that the Federal Government must be 'an equal opportunity employer.' The amendment to section 501 will aid in attaining that goal by providing for individuals aggrieved on the basis of their handicap the same rights, procedures, and remedies provided [to] individuals aggrieved on the basis of race, creed, color, or national origin." Senate Rept. No. 95-890, 95th Cong., 2d Sess. to accompany S.2600 (May 5, 1978), at 18. Congress expressly sought a parallelism between equal protection in matters involving race and handicap discrimination: "The joint explanatory statement accompanying the conference report on H.R. 14225 (the Rehabilitation Act Amendments of 1974) stressed this parallel relationship between section 504 and title VI of the Civil Rights Act of 1964, and noted that application of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal Government." Senate Rept. No. 95-890, 95th Cong., 2d Sess. to accompany S.2600 (May 5, 1978), at 19. *See* Smith v. Robinson, 468 U.S. 992, 1016 (1984) ["§ 504 simply prevents discrimination on the basis of handicap."]; Nisperos v. Buck, 720 F.Supp. 1424, n. 18, at 1432 (N.D.Ca. 1989) ["if plaintiff is qualified, the 'employment cannot be *based upon* the

The conclusion that handicap discrimination has no Constitutional status appears to be irreconcilable with the decision of this Court in Youngsburg v. Romeo, 457 U.S. 307 (1982), which discussed a Constitutional foundation for handicap discrimination rights. The Court adopted this analysis to handicap discrimination statutes in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982):

> "[A]ssuming the Act was designed to fill the need identified in the House Report — that is, to provide a 'basic floor of opportunity' consistent with equal protection — neither the Act nor its history persuasively demonstrate that Congress thought that equal protection required anything more than equal access." *Id.*, Slip. op. at 24.

While Rowley construed the Education of the Handicapped Act,[8] the EHA and Section 504,[9] are to be

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handicap.'" Emphasis in original], *quoting* Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985).

8 20 U.S.C. § 1401, *et seq.*, (Pub. L. 94-142) [hereinafter, EHA].

9 Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a) [hereinafter referred to as Section 504]. The courts have tended to analyze §§ 501 and 504 together under the same standards, *see, e.g.*, Nisperos v. Buck, 720 F.Supp. 1424, n. 4, at 1427 (N.D.Ca. 1989), except that § 501 requires exhaustion of administrative remedies while § 504 does not, Milbert v. Koop, 830 F.2d 354, 356 (D.C. Cir. 1987), and § 501 requires "affirmative action" in the form of greater degrees of "reasonable accommodation"

read *in pari materia*. *See* Smith v. Robinson, 468 U.S. 992, 1016–21 (1984).[10] This Court has held that Section 504 is an equal opportunity statute, as also held by the principal agency charged with its enforcement in their initial, contemporaneous regulations, *see*, Alexander v. Choate, 469 U.S. 287, 304–06 (1985).[11] A holding that Section 501 is not an equal protection statute effectuating a Constitutional basis is irreconcilable without result–oriented decision–making.[12]

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of otherwise qualified handicapped persons. Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985).

10 "While the EHA guarantees a right to a free appropriate public education [for the handicapped], § 504 simply prevents discrimination *on the basis of handicap*." *Id.*, 468 U.S. at 1016 [emphasis supplied].

11 As the Department of Health and Human Services has ruled interpreting this same provision as it applied to related services: "For the purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non–handicapped persons, but must afford handicapped persons *equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . ." 45 C.F.R. § 84.4(b)(2) [emphasis supplied], *cited with approval*, Alexander v. Choate, 469 U.S., at 305 (1985).

12 Indeed, while the Department of Justice was using Section 501 to support the quota–hiring complained of in this matter, the Department of Education was successfully arguing in its internal adjudication process that the statute is the type of equal opportunity statute that prohibited such differential treatment. *See*, Missouri State Department of Elementary and Secondary Education v. U.S. Department of Education, Docket No. 84–504–3 (*decided* September 20, 1988) [Reviewing Authority].

As this Court has instructed us, an absolute preference, or quota, is inconsistent with notions of equal protection. California Board of Regents v. Bakke, 438 U.S. 265 (1978). Affirmative action under Section 504, therefore, is limited. Southeastern Community College v. Davis, 442 U.S. 397 (1979).[13] A public employer is not free to engage in affirmative action without proper justification and authority. Wygant v. Jackson Board of Education, 476 U.S. 265 (1986). Even where the mandate for affirmative action permits hiring and selection preferences, as in race discrimination, the trial court is required to make a finding of past discrimination. Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992), *citing* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 265

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13 The rationale for affirmative action is entirely different under Title VII and Section 504. Handicapped persons are rarely insular minorities and the trait is rarely inherited as is race, creed, color, or national origin. Remedial measures aimed at reversing generations of a cycle of poor housing, poor schools, poor jobs, poor housing is utterly inapplicable. It is hardly surprising, then, that the statutory definition of affirmative action in the text of Section 501 is quite different than the case law definition in race discrimination cases. Title VII affirmative action provides a remedy for past generations of discrimination; Section 501 affirmative action eliminates barriers, provides reasonable accommodations, and gives access to equal opportunity. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

(1986); California Board of Regents v. Bakke, 438 U.S. 265 (1978).[14] The conclusion that handicap status is not a protected class is inconsistent with this equal protection analysis, and is therefore enough reason, standing alone, for the granting of *certiorari*. Rule 10.1(c).

The issues also need to be granted *certiorari* to ensure consistency of the Court's decisions with the Court's future decision in Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, No. 92-757, 507 U.S. __, (February 22, 1992) and Rivers v. Roadway Express, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, No. 92-938, 507 U.S. __, (February 22, 1992). The Government relied heavily on the argument that the Civil Rights Act of 1991 is not retroactive, applying over half its Appellee's brief to that point. *Cf,* Van Meter v. Barr, 778 F.Supp. 83 (D.C.D.C. 1991), 976 F.2d 1 (D.C. Cir. 1992) [Act not retroactive, but issue not ripe for review]. The issue of retroactivity has resulted in widely

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[14] Based on these citations, if Section 501 is interpreted, *de hors* the legislative history and cases, to permit quota-hiring affirmative action without a finding of past discrimination, then the statute is, itself, is unconstitutional. Though not required, petitioner recites that 28 U.S.C. § 2403(a) may be applicable; no court has certified the question to the Attorney General. Rule 29.4.

divergent views between the Circuits.[15] If this Court finds retroactivity in those cases, then nothing could be left of the cases on which the Government relies to assert lack of jurisdiction, since those cases merely hold that damage remedies are unavailable to plaintiffs like Mr. Appell. If this Court finds retroactivity in Landgraf and Rivers, it would be irreconcilably inconsistent to deny jurisdiction here.[16]

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15 *Compare* Hansel v. Public Services Co. of Colorado, 778 F.Supp. 1126 (D.Colo.) [recognizing that the principle of *expressio unius* ought to apply to the issue of retroactivity, but declining to apply it]; *with*, Mojica v. Gannett Company, Inc., 779 F.Supp. 94, 57 Fair Empl.Prac.Cas. (BNA) 537 (N.D.Ill. 1991) [statute presumed retroactive, noting, further, that the presumption of retroactivity must apply more strenuously if the dispute involves a public party, *citing* In re Busick, 831 F.2d 745, 748–49 (7th Cir. 1987)]; King v. Shelby Medical Center, 779 F.Supp. 157 (N.D.Ala. 1991) [J. Acker] [statutory provisions which are either "merely remedial in nature," *citing* U.S. v. Peppertree Apts., 942 F.2d 1555 (11th Cir. 1991), or procedural, such as the jury demand and damage provisions of the Civil Rights Act of 1991, are presumptively applied retroactively absent clear, and, in this statute, insufficient, legislative intent to the contrary]; Civil Rights Act of 1991, Pub. L. 102–166, at title IV, 105 Stat. 1071, 1099, § 402, 42 U.S.C. § 1981 note [by its terms, the interpretations and additional remedies in the statute apply to all pending matters except that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983"].

16 Even if the High Court finds that the Civil Rights Act is not retroactive, the Court's decision will likely affect the result in cases based on Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) [damages unavailable against government]. That case was central to the Government's position that civil rights petitioners against the

The courts below, on the Attorney General's motion, did not reach the substantive issue of coverage under Section 504, ruling, rather, that they lacked jurisdiction,[17] and this conclusion is so significantly inconsistent with existing case law that it is a further basis for the granting of the writ. Jurisdiction over this controversy exists under a statute specifically providing jurisdiction for disputes regarding handicapped discrimination by the Federal government, 29 U.S.C. § 794a(a)(1), COMPLAINT, at ¶ 1; Appendix, at 13, or, in the alternative, if his claim of discrimination is not covered by that Act, under the statute giving the Federal courts jurisdiction over all claims of civil rights violations, 28

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government have no action in the courts. This Court has held that a damage remedy existed prior to the Civil Rights Act of 1991, Franklin v. Gwinnett Co. Public Schools, __ U.S. __, 112 S.Ct. 1028, 1033-35 (1992), and the anticipated ruling in the new case may explain that jurisdiction existed before the Civil Rights Act of 1991.

[17] The Government confuses the issues of subject matter jurisdiction under FED. R. CIV. PROC. 12(b)(1) with the existence of a claim under FED. R. CIV. PROC. 12(b)(6), it was also apparent that the issue of Section 504 coverage in this case would not be resolved at the trial court level. Judge Oberdorfer's handling of the issue, by narrowing the appellate issues tightly in accordance with the Government's brief and eliminating the need for fact–finding prior to an appellate ruling on the central issue, was an effective and judicially efficient short–cut for the alternative and less favored method of interlocutory appeals. *See* 28 U.S.C. § 1292(b).

U.S.C. § 1343,[18] or, in the alternative, under the remedial provisions of 42 U.S.C. § 1983,[19] or, in the alternative, under general Federal question jurisdiction, 28 U.S.C. § 1331.[20] All else failing, the Complaint asserts a Constitutional basis wholly not addressed by the

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18 This jurisdictional basis is specifically cited in the Complaint, COMPLAINT, at ¶ 1; Appendix, at 13.

19 This jurisdictional basis is also specifically cited in the Complaint, COMPLAINT, at ¶ 1; Appendix, at 13.

20 *See* COMPLAINT, at ¶ 1; Appendix, at 13. It is difficult to imagine the argument by which a challenge to a Federal statute, policy, and practice, by one adversely affected by it is not, at least, a Federal question, and the Government makes no such argument. Rather, the Government focuses on the unavailability of compensatory or punitive damages under such jurisdiction. Plaintiff appellant has never argued here or in the court below that such damages would be available absent the Civil Rights Act of 1991. The authorities cited by the Attorney General state that no damages action is available against the Federal Government; the cases do not hold that injunctive relief, such as backpay, reinstatement, and attorney's fees, are barred. *See, e.g.*, Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990),. The cases cited by the Government have been contradicted by this Court in Franklin v. Gwinnett Co. Public Schools, __ U.S. __, 112 S.Ct. 1028 (1992), in which this Court stated, reaffirming Bell v. Hood, 327 U.S. 678 (1946):

> "Where legal rights have been invaded, and a federal statute [28 U.S.C. § 1331; 42 U.S.C. § 1983] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Id., at § A [citations to statutes to which the Court was referring supplied], *citing with approval*, Bell v. Hood, 327 U.S. at 684 (1946).

Government or court below,[21] though pled and briefed. *See* COMPLAINT, at ¶ 1; Appendix, at 13.[22] Even if, *arguendo*, the courts lack jurisdiction because Section 504 does not cover petitioner, Mr. Appell surely has at least the standing of an alleged drug dealer attacking the Constitutional violations of Federal agents,[23] or of the plaintiffs in Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), before Section 504 was enacted.[24]

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21 Except for the limitation as to compensatory and punitive damages. *Id.*

22 Finally, no argument was ever made to dismiss the Civil Service Reform Act Count II, though the court had jurisdiction over that Count under 28 U.S.C. § 1331 in addition to its pendent status to Count I.

23 Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

24 Contrary to the prior arguments of the Government, Mr. Appell is seeking no money damages against individual federal employees, and is not excluded by Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988). Appellant is not seeking a *Bivens* remedy in addition to an already-provided statutory remedy, but seeks either the remedy Congress intended for him in Sections 501 and 504, or, if this Court holds that the statute excludes appellant from statutory protection, he seeks his relief under the alternative bases for jurisdiction provided by Congress or the Constitution. Section 504 provides no elaborate remedial scheme in its few sentences, *cf.* Schweiker v. Chilicky, 487 U.S. 412 (1988), and, if the plain language, in derogation of the legislative history of Section 504, excludes this appellant, that exclusion must have been inadvertent. *Cf.* McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988).

Jurisdiction over this matter under Section 504 exists on the plain language of the statute. The Rehabilitation Act provides that:

> "The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . shall be available to *any* employee or applicant for employment aggrieved by the final disposition of such complaint. . . ."

29 U.S.C. § 794a(a)(1) [emphasis supplied]; *see also*, 29 U.S.C. § 791; 29 C.F.R. § 1613.281; 42 U.S.C. § 2000e–16. Since plaintiff is an employee aggrieved by a final disposition of a complaint,[25] the trial court had jurisdiction to hear his employment discrimination claim. Milbert v. Koop, 830 F.2d 354, 355–57 (D.C. Cir. 1987).[26]

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25 The Attorney General below cited this Court's restatement of the statute in order to change "aggrieved by the final disposition of such complaint" to "aggrieved by violation of § 501." A reading of the cited case reveals that the Court had no intention of re-writing the statute, in what would have been pure *dicta*, to make proof of the cause of action a circular prerequisite for jurisdiction. In context of the Court's decision in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1984), the two statements are the same, and any person "aggrieved by the final disposition of such complaint" has jurisdiction in the federal courts. 29 U.S.C. § 794a(a)(1).

26 "Further, application of the title VII provisions makes specific the right to bring a private right of action with respect to section 501, subject, of course, to the provision for exhaustion of administrative remedies set forth in title VII." Senate Rept. No. 95-890, 95th Cong., 2d Sess. to accompany S.2600 (May 5, 1978), at 19.

Conclusion

For the reasons stated herein, this Honorable Court should issue a writ of *certiorari* to the District of Columbia Circuit, or, in the alternative, should reverse on the issue of jurisdiction and remand for further development of the remaining issues.

Respectfully submitted,

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(202) 638-2300
Attorney *pro bono* for Petitioner

APPENDIX

JUDGMENT, Appell v. Attorney General, No. 91–5168 (*filed* February 1, 1993) 2

MEMORANDUM, Appell v. Thornburgh, Civil Action No. 90–2112 LFO (*filed*, May 10, 1991) 5

ORDER, Appell v. Thornburgh, Civil Action No. 90–2112 LFO (*filed*, May 10, 1991) 10

ORDER, Appell v. Thornburgh, No. 91–5168 (*filed* March 17, 1993) [*en banc* and panel Orders] 11

COMPLAINT, Appell v. Thornburgh, Civil Action No. 90–2112 LFO 13

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5168 September Term, 1992
CV 90-2112

Stephen Appell, Filed February 1, 1993

Appellant

v.

Richard Thornburgh
Attorney General

Appeal from the United States District Court
for the District of Columbia

BEFORE: Wald, Ruth B. Ginsburg and D. H. Ginsburg, Circuits Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by counsel. On plaintiff-appellant's motion, the case was submitted without oral argument. After full review of the issues presented, the court is satisfied that appropriate disposition of the appeal does not warrant an opinion. See D.C. Cir. Rule 14(c).

The district court correctly ruled that the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides a claim for relief only for persons "with handicaps." Nor is the classification at stake an irrational one when measured by the Constitution's equal protection constraint. *Cf. DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 725 (10th Cir. 1988) (handicapped are not "suspect class for equal protection analysis"). Furthermore, plaintiff-appellant's protracted but amorphous attack on the DOJ's alleged "quota hiring" as unconstitutional, unauthorized by statute, violative of Government personnel practices, and *ultra vires* is not moored to any focused, comprehensible claim for relief plaintiff-appellant is qualified to pursue. It is, therefore,

ORDERED and ADJUDGED that the district court's Order, filed May 10, 1991, be affirmed, substantially for the reasons indicated in that Order.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 1(b) (2).

PER CURIAM
FOR THE COURT:

/s/

RON GARVIN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN APPELL, Plaintiff v. DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE Defendant	Civil No. 90-2112-LFO Filed May 10, 1991

MEMORANDUM

Plaintiff Stephen Appell formerly worked as a Program Analyst in the Civil Rights Division of the United States Department of Justice. In 1984, defendant hired a handicapped person to fill a position as Supervisory Program Analyst. Appell is not physically handicapped. He files this complaint under Title VII, 42 U.S.C. § 2000e et seq., the Rehabilitation Act of 1973, 29 U.S.C. § 794, 28 U.S.C. §§ 1331 & 1343, 42 U.S.C. § 1983, and the Constitution. He alleges that defendant discriminated against him because he is not handicapped by failing to permit him the

opportunity to compete for the position as Supervisory Program Analyst. He further alleges retaliation and constructive discharge. Defendant moves to dismiss the complaint on the ground that plaintiff fails to state a cause of action under Fed. R. Civ. P. 12(b) (6). Plaintiff cross moves for partial summary judgment or for summary judgment. For the reasons stated below, defendant's motion will be granted and plaintiff's motion will be denied.

The Rehabilitation Act provides:

> No otherwise qualified individual with handicaps in the United States, as defined in Section 706(7) of the title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. By the clear wording of the statute, therefore, an individual who is not handicapped is not protected under the statute from discrimination. Plaintiff cites

legislative history including congressional reports describing the Rehabilitation Act as prohibiting discrimination "on the basis of" handicap, paralleling the language of Title VII. See Plaintiff's Opposition to Motion to Dismiss (filed March 29, 1991) at 5-7. Legislative history is helpful to the interpretation of ambiguous statutory language. With respect to plaintiff's claim, however, the statutory language is clear. Plaintiff is by his own admission not an "individual with handicaps." Accordingly, the Rehabilitation Act does not apply to him. Plaintiff argues in his opposition to defendant's motion to dismiss that the Act as so interpreted violates the equal protection clause. This contention must fail because plaintiff is not a member of a suspect class.

Furthermore, as defendant notes, plaintiff's claim cannot proceed under Title VII, § 1331, § 1343, § 1983, or the Constitution. Title VII prohibits employment discrimination against plaintiff on the basis

of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Plaintiff has failed to allege any such discrimination. 42 U.S.C. § 1983 prohibits deprivation of plaintiff's rights under color of state law. Plaintiff has not alleged that defendant acted under color of state law. Plaintiff does not allege in the complaint any violation of any constitutional provision, nor has he set forth facts that would support any such claim. 28 U.S.C. §§ 1331 confers jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." However, plaintiff's claim does not arise under any law, treaty or provision of the Constitution. Section 1343 similarly confers jurisdiction over plaintiff's claim only where an independent cause of action exists "under any Act of Congress providing for the protection of civil rights . . . ." No such cause of action exists. For these reasons, this Court does not have federal jurisdiction over this case.

Accordingly, an accompanying Order grants defendant's motion to dismiss and dismisses plaintiff's complaint.

Date: May 10, 1991

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN APPELL, Plaintiff v. DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE Defendant	Civil No. 90-2112-LFO Filed May 10, 1991

ORDER

For the reasons stated in the accompanying Memorandum, it is this 10th day of May, 1991, hereby

ORDERED: that defendant's motion to dismiss the complaint should be, and is hereby, GRANTED; and it is further

ORDERED: that plaintiff's cross motion for partial summary judgment or for summary judgment should be, and is hereby, DENIED; and it is further

ORDERED: that this case is hereby DISMISSED.

Date: May 10, 1991

/s/
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5168 September Term, 1992
CV 90-2112

Stephen Appell, Filed March 17, 1993

Appellant

v.

Richard Thornburgh
Attorney General

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:

/s/
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5168 September Term, 1992
CV 90-2112

Stephen Appell, Filed March 17, 1993

Appellant

v.

Richard Thornburgh
Attorney General

BEFORE: Wald, Ruth B. Ginsburg and D. H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed February 25, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:
/s/
Robert A. Bonner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN APPELL,
8900 Footstep Court
Annandale, Virginia 22003

Plaintiff

v.

DICK THORNBURGH,
ATTORNEY GENERAL,
UNITED STATES
DEPARTMENT OF JUSTICE
9th & Constitution Avenue, N.W.
Washington, D.C. 20001

Defendant

Civil No. 90–2112

ORIGINAL COMPLAINT

(Discrimination in Employment, Pendent Claim for Violations of the Civil Service Reform Act, Pendent Claim for Intentional Infliction of Extreme Emotional Distress)

COMES NOW Plaintiff, Stephen Appell, by and through his counsel, Richard S. Sternberg, Esquire, and complains as follows:

Statement of Facts Applicable to All Counts

1. Jurisdiction for this matter lies under 29 U.S.C. § 794a(a)(1) [private right of action under Rehabilitation Act of 1973, as amended], 42 U.S.C. § 2000e-16(c) [private right of action under Civil Rights Act of 1964, as

amended], 28 U.S.C. § 1331 [federal question], 28 U.S.C. § 1343 [civil rights], 42 U.S.C. § 1983, or, the United States Constitution.

2. Plaintiff duly complained of discrimination and personnel violations to his former agency and, in accordance with agency practice, duly appealed the rulings therein to the Equal Employment Opportunity Commission (hereinafter the EEOC), and the EEOC issued a denial of his claim on July 31, 1990, plaintiff's receipt of which occurred within thirty (30) days of this filing.

Count I
(Employment Discrimination)

3. Plaintiff herein seeks Court-review of an adverse decision of the EEOC on the grounds argued therein.

4. On or around 1984, plaintiff was denied the opportunity to compete for the position of Supervisory Program Analyst (SPA), GM-14, a position for which he is qualified, solely because he is non-handicapped, and the policy and practice used by the Department of Justice for this selection resulted in the disparate treatment of

plaintiff and had a disparate impact on members of his class, to wit, non-handicapped persons.

5. As a proximate result of said employment discrimination, plaintiff was not selected for the position of Supervisory Program Analyst (SPA), GM-14.

6. Plaintiff was harassed because he is non-handicapped or, in the alternative, in retaliation for asserting his rights to be free from discrimination based on handicap, in that, at least, (a) he was not compensated at the supervisory pay rate while he was acting SPA; (b) he was not properly or timely reclassified as a program analyst from his previous position as a civil rights program specialist; (c) he did not receive his mid-cycle progress review for the period ending March 31, 1984, and was not given an employee workplan during the period he was acting supervisor; (d) despite his requests, he was not transferred from the agency's liaison unit to the handicapped unit; (e) he did not receive a desk audit as requested and was threatened with a downgrade if he persisted in such a request; (f) he was continually harassed by his supervisor; (g) despite the performance review committee's recommendation, he did not receive a monetary award; and (h) he was not provided with an

employee workplan after being reclassified as a program analyst.

7. As a proximate result of the denial of the ability to compete for the promotion and the harassment above-alleged, plaintiff was constructively discharged.

Wherefore, plaintiff respectfully requests: 1) retroactive promotion to the GM-14 level in the appropriate classification series from the date of his *de facto* temporary promotion; 2) backpay as allowed by law or equity; 3) reinstatement in accordance with the promotion awarded; 4) other compensatory damages; 5) such other relief as the Court shall deem just and proper; and 6) costs and reasonable attorneys' fees.

Count II
(Pendent Claim for Violations of the Civil Service Reform Act)

8. Plaintiff incorporates by reference the allegations in paragraphs 1 through 7, inclusive, and further states that plaintiff sought relief for the stated violations of Federal personnel statute and regulations by proper complaint to the agency, that the agency chose to investigate and adjudicate those complaints as merged with the discrimination complaint.

9. Plaintiff has exhausted administrative remedies for those complaints and they are ripe for trial in this Court.

10. This Court has pendent and ancillary jurisdiction over the said claims in that they arise out of the same body of operative facts and adjudication in this forum will further serve judicial economy.

Wherefore, plaintiff respectfully requests: 1) retroactive temporary promotion to the GM-14 level in the appropriate classification series during the period of his *de facto* temporary promotion; 2) backpay as allowed by law or equity; 3) such other relief as the Court shall deem just and proper; and 4) costs and reasonable attorneys' fees.

Count II
(Pendent Claim for Intentional Infliction of Extreme Emotional Distress)

11. Plaintiff incorporates by reference the allegations in paragraphs 1 through 10, inclusive, and further states that said conduct by defendant was extreme and outrageous and had the proximately foreseeable effect of causing extreme emotional distress to the plaintiff.

Wherefore, plaintiff respectfully requests compensatory damages in the fair and just sum of $100,000, and such other relief as may be just and proper, plus costs.

I HEREBY SWEAR OR AFFIRM UNDER PENALTIES OF PERJURY THAT I HAVE READ THE AFOREGOING COMPLAINT AND IT IS TRUE AND CORRECT ON PERSONAL KNOWLEDGE.

/s/
Stephen Appell

Respectfully submitted,

/s/
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(202) 638-2300
Attorney for Plaintiff

JURY DEMAND

Plaintiff demands a jury of twelve as to all matters duly triable to a jury.

/s/
Richard S. Sternberg, Esquire

Supreme Court, U.S.
FILED
JUL 2 1993
OFFICE OF THE CLERK

No. 92-1747

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN APPELL, PETITIONER

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITON

DREW S. DAYS, III
Solicitor General

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner, a government employee, has a cause of action under the Rehabilitation Act of 1973, other federal statutes, or the Constitution, based on his allegation that the government failed to promote him because he was not handicapped.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 2a-4a) and the district court (Pet. App. 5a-9a) are unpublished, but the judgment of the court of appeals is noted at 984 F.2d 1255 (Table).

JURISDICTION

The decision of the court of appeals was filed on February 1, 1993. The petition for a writ of certiorari was filed on May 3, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Justice's Civil Rights Division employed petitioner, a nonhandicapped white male, as a program analyst. In 1984, the Division selected James Bennett, an equal opportunity specialist, rather than petitioner, for the position of Supervisory Program Analyst. Pet. xxvi. Thereafter, alleging that he was treated less favorably because he was not handicapped, petitioner filed suit claiming a right to relief under the Rehabilitation Act of 1973, 29 U.S.C. 794; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 1983; 28 U.S.C. 1331 and 1343; and the Constitution.

2. The district court dismissed the complaint for failure to state a claim. Pet. App. 5a-9a. The court concluded that the plain language of the Rehabilitation Act provides a cause of action for discrimination only to individuals with handicaps. Pet. App. 6a-7a. See 29 U.S.C. 794(a). The court also held that respondent's hiring decision did not violate the Constitution, explaining that plaintiff was not a member of a suspect class for purposes of the guarantee of equal protection of the laws. Pet. App. 7a. The district court further held that neither Title VII, 28 U.S.C. 1331 and 1343, nor 42 U.S.C. 1983, afforded a basis for petitioner's claim. It explained that petitioner alleged no discrimination based on "race, color, religion, sex, or national origin," as Title VII requires, 42 U.S.C. 2000e-16(a), and did not claim that respondent acted "under color of state law" for purposes of 42 U.S.C. 1983. Finally, the court observed that 28 U.S.C. 1331 and 1343 supply no independent cause of action for a claim of reverse discrimination, but only confer general subject-matter jurisdiction over other claims. Pet. App. 7a-8a.

3. The court of appeals affirmed. Pet. App. 2a-3a. It first expressed agreement with the district court's

holding that, since petitioner has no handicap, the Rehabilitation Act does not provide him with a cause of action. *Id.* at 3a. Noting that handicapped persons do not constitute a suspect class for purposes of the constitutional guarantee of equal protection, the court of appeals stated that "the classification at stake" is not "an irrational one when measured by the Constitution's equal protection constraint." *Ibid.*

ARGUMENT

Petitioner alleges that the Department of Justice's rejection of him in favor of a handicapped individual for a supervisory position violated the Rehabilitation Act, various other statutes, and the constitutional guarantee of equal protection of the laws. The courts below correctly disposed of this case, and it does not warrant further review.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps in the United States * * * shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination" in federal programs and activities. 29 U.S.C. 794(a); see also 29 U.S.C. 791. In addition, the Act directs federal agencies to develop affirmative action plans to ensure "adequate hiring, placement, and advancement opportunities for individuals with handicaps." 29 U.S.C. 791(b). By its terms, the Act does not protect nonhandicapped individuals from so-called "reverse discrimination," nor does it dictate that federal agencies make employment decisions that do not take a person's handicaps into account. In this respect, the Rehabilitation Act differs from Title VII, which expressly provides that federal agency personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a).

With respect to the constitutional guarantee of equal protection, this Court has held that "reverse discrimination" may run afoul of the Constitution if based on suspect classifications such as race. See, *e.g.*, *Shaw* v. *Reno*, No. 92-357 (June 28, 1993), slip op. 19; *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). No court has ever held, however, that possession of a handicap—or more precisely as regards petitioner, the *non*-possession of a handicap—defines a "suspect class," or that statutory distinctions based on handicap are subject to a standard more exacting than the "rational basis" test. See *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 725 (10th Cir. 1988), cert. denied, 111 S. Ct. 799 (1991); *Brown* v. *Sibley*, 650 F.2d 760, 766 (5th Cir. 1981); see also *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation is not suspect classification calling for more exacting standard of review than that normally accorded economic and social legislation).

Petitioner does not allege that the handicapped individual selected for the position he sought was not fully qualified. Moreover, even assuming that the employment decision here took into account the selectee's handicap, use of that factor is not irrational, since it advances the legitimate governmental objective of ensuring the availability of "adequate hiring, placement, and advancement opportunities for individuals with handicaps," 29 U.S.C. 791(b), and thereby promoting their economic independence and participation in all aspects of life.

Finally, as the courts below correctly held, see Pet. App. 3a; 7a-8a, the other statutes upon which petitioner relies—28 U.S.C. 1331 and 1343, 42 U.S.C. 1983, and 42 U.S.C. 2000e-16(a)—provide no independent cause of action based on the allegations in his complaint. Title VII does not prohibit discrimination on the basis of handicap,

and petitioner has made no claim of deprivation of rights under color of state law, as required by 42 U.S.C. 1983. Finally, neither 28 U.S.C. 1331 nor 28 U.S.C. 1334 provides an independent cause of action. Each only confers jurisdiction over actions arising under other federal statutes or the Constitution. Because petitioner has no statutory or constitutional claim, those provisions do not help him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STUART E. SCHIFFER
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JULY 1993